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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, PETITIONER

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 323–337) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's orders were entered on July 19, 1962 (R. 338–344). A timely petition for rehearing was denied on April 16, 1963 (R. 344). The petition for a writ of certiorari was filed on July 15,

1963, and granted on October 14, 1963 (R. 345). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a producer applying for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act also requests, on emergency grounds, the grant of temporary operating authority, may the Commission condition such temporary authorization upon the applicant's maintaining a prescribed initial price pending final disposition of the application?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, and of the Commission's Regulations Under the Natural Gas Act, 18 C.F.R. Subchapter E, are set out in the Appendix, *infra*, pp. 40–46.

STATEMENT

This case involves seven temporary authorizations of sales of natural gas issued to independent producers by the Federal Power Commission under Section 7 of the Natural Gas Act.[1] In each case, the Commission conditioned the temporary authorization upon the producer's (1) charging an initial price lower than the contract price and (2) maintaining that price

[1] *E.g.*, R. 15–17, 86–87, 87–89, 113–115, 168–170, 204–205.

without increase during the period of service under temporary authorization.

The court below approved the condition reducing the initial price. However, it set aside the Commission's order on the ground that the Commission lacked authority, in the exercise of its certificating powers, to prevent a producer from filing and putting into effect a contractually authorized increased rate, even during the term of a temporary authorization.

The Commission proceedings.—The procedural histories of the seven temporary authorizations are substantially the same, although there is some variation in the dates of some of the relevant occurrences and in the gas fields involved. As the court below indicated (R. 824), it is sufficient to describe the Commission proceedings relating to the sale by the Hassie Hunt Trust from the Alta Loma area in Galveston County, Texas,[1] as typical of all. This was a sale pursuant to a contract dated December 15, 1960.

In the preceding July, a permanent certificate had been issued authorizing sales from the Alta Loma and other areas to Peoples Gulf Coast Natural Gas Pipeline Company. *Peoples Gulf Coast Natural Gas Pipeline Co.*, 24 FPC 1 (R. 99). The Commission order had conditioned the issuance of that certificate upon the filing by the producer of a contract amendment to

[1] This is F.P.C. Docket No. C161–1283. One other subject sale was made from the same area. The others were made from Alvin City and Chenango Fields, in Brazoria County, Texas. (R. 2, 142, 324). All the sales are from Texas Railroad District No. 3 (R. 824).

provide for an initial price of 20 cents, with a single 3-cent escalation after ten years, rather than an initial price of 20 cents with four 2-cent escalations at four-year intervals as originally provided. 24 FPC at 9. The July 1960 order, however, was defective. The Public Service Commission of New York had been denied intervention in the Commission proceeding—intervention which it had sought in order to contend, pursuant to the principles of *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*CATCO*), that an initial price lower than the 20-cent contract price was required. On review, the denial of its intervention was held erroneous. *Public Service Commission of New York* v. *Federal Power Commission*, 295 F. 2d 140 (C.A.D.C.), certiorari denied *sub nom. Shell Oil Co.* v. *Public Service Commission of New York*, 368 U.S. 948. To remedy the error,[3] the Commission on November 2, 1961, entered an order vacating the issuance of the certificate and ordering a new hearing on the initial price question. *Hassie Hunt Trust*, 26 FPC 689.[4]

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[3] The court's order had not in terms set aside the certificate order since the order under immediate review was that denying intervention. An earlier decision of the Court of Appeals for the District of Columbia Circuit had held that a denial of intervention must be reviewed immediately and independently of the final decision on the merits of the proceeding in which intervention was sought, but that the Commission could not, by proceeding to a decision on the merits, moot the intervention question. *Public Service Commission of New York* v. *Federal Power Commission*, 284 F. 2d 200.

[4] This vacating order is now being challenged. *Placid Oil Co.* v. *Federal Power Commission*, C.A. 5, No. 19500, and *Margaret Hunt Hill* v. *Federal Power Commission*, C.A. 5, No. 19499.

Subsequent to the issuance of the July 1960 certificate, the Commission issued its statement of General Policy No. 61–1, 18 C.F.R. 2.56, 24 FPC 818, announcing the prices which would be used as guides in determining whether proposed initial rates should be certificated without a price condition. The guideline rate for initial prices for Texas Railroad District No. 3 (from which all of the present sales are made) was 18 cents per Mcf, or 2 cents less than the initial price allowed by the July 1960 order.

Thereafter, on February 27, 1961, the Hassie Hunt Trust applied to the Commission for a certificate of public convenience and necessity to make the sales in issue here from a new well in the same area. The proposed sales were to Natural Gas Pipeline Company of America, the corporate successor to Peoples Gulf Coast (R. 74–87). In addition, it sought temporary authorization to begin service immediately, alleging the existence of an emergency situation resulting from the "necessity of paying shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than Natural" (R. 80).[3] The new sale was covered by a twenty-year contract calling for an initial price of 20 cents per Mcf with four 2-cent escalations at four-year inter-

[3] Section 7(c) of the Natural Gas Act, *infra*, pp. 43–44, authorizes the issuance of temporary authority "in cases of emergency." Implementing that Section, the Commission has promulgated rules (18 C.F.R. 157.28(c)), which recognize that any one of various types of threatened physical or economic loss (flaring, drainage of gas, threatened loss of lease, economic hardship from payment of shut-in royalties) may constitute an emergency.

vals, as had the original contract in the earlier sale (R. 85). This meant not only that the initial contract price exceeded the previously announced guideline but that, in light of the escalation provisions, the weighted average price over the 20-year term of the contract would be higher than the Commission had ever certificated without condition in Texas Railroad District No. 3 (R. 144–145, 325).

The Commission, on April 7, 1961, granted the temporary authorization subject to the conditions that (1) the total initial price not exceed 18 cents per Mcf; (2) within 20 days supplements to rate schedules and revised billing statements be filed consistent with the prescribed price condition; and (3) the temporary authorization be accepted in writing within 20 days (R. 87).

The producer commenced deliveries on April 19, 1961 (R. 134–135). Not until May 5, 1961, however, did it file a purported acceptance of the temporary authorization.* That "acceptance" reserved the right to seek removal of the conditions imposed and to seek an increased rate in accordance with the terms of an amended rate schedule concurrently tendered. The amended contract provided that the initial price would be 18 cents per Mcf for the first thirty days following commencement of deliveries and 20 cents thereafter (R. 91–92, 130–138). At the same time, the producer applied for rehearing of the order imposing the conditions (R. 93–133).

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*With respect to the four sales from Chenango Field, n. 2, *supra*, p. 3, the producers filed acceptances of the temporary authorizations (R. 170, 206) prior to commencement of deliveries on September 28, 1961.

On May 31, 1961, the Commission denied rehearing (R. 113–115). It also rejected the purported acceptance since the amended rate schedule appeared to authorize an increase from the 18-cent rate during the period of the temporary authorization, a change that would be inconsistent with the condition specifying the 18-cent initial rate. To remove any possible doubt as to the meaning of the condition, the Commission modified its language to provide expressly that no change from the 18-cent rate could be made for the duration of the temporary authorization (R. 113–114). By the same order the Commission also rejected a notice of change to a 20-cent rate which the producer had tendered for filing on May 12, with a requested effective date of May 19 (R. 130–136).[1] The Commission later denied a renewed application for rehearing (R. 115–129) and rejected the re-tendered (R. 141–142) 20-cent rate filing (R. 142–143). Timely petitions to review followed.

On November 2, 1961, prior to the certification of the Commission's record to the court below (*i.e.*, within the statutory period during which the Commission retains jurisdiction to modify orders under review, Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r (b)), the Commission sent a letter order to the producer which amplified the previous orders and modified them in one respect (R. 144–145). The Commission said it would permit the amended rate schedule[2] to

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[1] No increased rate filings have been made with respect to the four sales from Chenango Field.

[2] Section 154.93 of the Commission's Regulations Under the Gas Act defines "rate schedule" to mean the basic contract as amended. 18 C.F.R. 154.93.

be filed, explaining, however, that such a filing would be accepted solely to permit the Commission files to reflect the terms of the contract existing between producer and purchaser and that the acceptance "should not be construed as permission for you to file for an increased rate pursuant to Section 4(d) of the Natural Gas Act during the pendency of the temporary authorization." (R. 147). The Commission also explained that the initial-rate condition of 18 cents had been imposed in accordance with its Statement of General Policy No. 61–1, 18 C.F.R. 2.56, and that (R. 147–148):

> • • • The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases. It has not been shown that the public interest will permit temporary authorization of the proposed sale without the condition heretofore prescribed by the Commission to prevent such consequences.

The decision below.—The court below held that the imposition of the 18-cent initial price condition was justified, and that the Commission had the power under the terms of Section 7(e) of the Act to condition a temporary authorization upon a reduction of the initial rate, thereby rejecting the producers' contention that the Commission's authority to protect consumer interests was limited to allowing collection of the contract price subject to refund. It also held that the Commission had the power, on an application for rehearing, to specify more stringent requirements or conditions than those made explicit in its original order.

Recognizing that collection of a price in excess of 18 cents during the term of the temporaries might make "maintenance of price line something less than completely effective" (R. 333), the court nevertheless held that the Commission could not lawfully condition temporary authorizations so as to prohibit the filing and collection of increased rates pursuant to Section 4 of the Act.

SUMMARY OF ARGUMENT

I

The court of appeals has held that the Commission, in granting the *ex parte* request of an independent producer for a temporary authorization to sell natural gas, may not impose a condition prohibiting the applicant from increasing its initial rate during the pendency of its application for permanent authority. Its view is that the agency exhausts its authority un-

der the certificate provision of the Act (Section 7), whether the grant be a temporary or a permanent one, when it examines the initial rate, and that thereafter it must look to its rate-control powers (Section 4) to deal with escalations in that rate.

Section 7, however, expressly empowers the Commission to incorporate reasonable terms and conditions in its grants of authority. What a producer proposes to charge for its gas next month or next year is surely no less relevant to the public convenience and necessity than what it proposes to charge today. Consumer protection is the touchstone of the Act, and the duty to scrutinize initial rates with care (*Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*CATCO*)) imports a similar duty to evaluate the consequences around the corner. The fact that the Commission also has rate powers hardly suggests that it should exercise its powers of certification, which were purposefully drawn in broad terms, with a blind eye to the rate problems which might be promptly generated by an unconditional grant.

The point is given added emphasis by the consideration that rate regulation is far from a perfect tool. Rate proceedings, to begin with, are often long and burdensome. More than that, however, initial rates can only be suspended for a limited period. When they become effective, they may have untoward consequences upon the price structure, *eg.*, through triggering the rates of other producers, even if they are ultimately rolled back. Finally, refunds to those

who have been charged excessive rates in the interim constitute a remedy of only limited effectiveness. *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145.

If two gas producers seeking authority came before the Commission with contracts of sale which were identical, except that one provided for escalations in 30 days and the other for comparable escalations in three years, it could not be doubted that the Commission might properly prefer the application of the former. By the same token, we submit that it may tender authority to the latter conditional upon its filing no increase for the longer period. The fact that a producer is limited by its contract (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332) does not mean that the Commission's powers of certification are subordinate to that contract and that it may impose no added restrictions.

II

What has been said above applies with special force to an applicant which has invoked the Commission's purely discretionary power to issue a temporary or interim authorization on the ground that it may suffer loss while awaiting the outcome of permanent certificate proceedings. Temporary grants are characteristically made without a hearing and without opportunity to consider objections from parties (including consumers) who might be adversely affected. It is particularly incumbent upon the Commission in such a case to safeguard the public interest

by insisting upon the maintenance of a rate which is "in-line". As already observed, the very collection of excessive rates may cause injuries which are not fully remediable. It would be anomalous if such injuries were to be occasioned by producers which had not yet demonstrated that they should be authorized to sell their gas in interstate commerce.

The Third Circuit has concluded, for these reasons, that a natural gas company operating under an interim authorization is impliedly obligated to maintain the *status quo* until the terms and conditions of its operations are finally fixed by permanent certificate provisions. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494. The instant case is stronger than *Alabama-Tennessee*, for here the prohibition upon the producer was an express one.

We submit, finally, that a producer taking with plain notice that the authorization to commence sales in interstate commerce is subject to the condition that it maintain the *status quo* pending hearing and final determination is estopped, once it has begun to operate under that certificate, to attack the condition upon which the grant of authority was conferred. Cf. *Callanan Road Co.* v. *United States*, 345 U.S. 507.

ARGUMENT

INTRODUCTION

In passing upon the applicant's representations as to the existence of emergency conditions, the Commission concluded that there was no basis for assuming

that, at the proposed prices, sale of these supplies of gas in interstate commerce would be required by the public convenience and necessity. Recognizing its primary obligation to protect consumers and to scrutinize prices,[9] the Commission found it necessary to condition temporary authorization upon a reduction in prices. This reduced price, it further specified, must be maintained for the duration of the temporary authorization, *i.e.*, while the matter of granting a permanent certificate and of attaching appropriate conditions to that authorization was undergoing hearing, consideration, and decision. It explained that maintenance of the specified price ceiling for the duration of the temporary authorization was required because the very collection of higher prices, even though they would be subject to refund, might have "an inflationary effect upon the prices charged and to be charged by others in the area," "irrevocably breach[ing] the price line or trigger[ing] price increases" (R. 71, 73).

The court below did not disagree with this finding. Indeed, it acknowledged that collection of the contract price, subject to refund "makes maintenance of price line something less than completely effective" (R. 333). Nevertheless, it struck down the condition on the ground that the Commission's power to maintain the price line was subordinate to a producer's right, which it found in the rate sections of the Gas Act, to put into effect the prices authorized by its private contract.

[9] See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*CATCO*).

We shall argue, first, that the court of appeals has drawn incorrect inferences as to the relationship of the rate and certification sections of the Act and that the Commission, whenever it exercises its powers of certification, may impose reasonable conditions upon the filing of rate changes. We urge, secondly, that even if such a restraint were impermissible in connection with the issuance of a permanent authorization, the Commission would be fully warranted in insisting upon the maintenance of the *status quo* during the period of a temporary authorization. In this aspect, it is crucial that the authorization is one granted the producer on the basis of his representations that he should be relieved of the onerous consequences of delay and without an opportunity for plenary consideration of the interests and objections of potentially adverse parties.

I

THE COMMISSION HAS THE POWER TO ISSUE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UPON CONDITION THAT THE INITIAL PRICE PRESCRIBED IN THE CONTRACT BE MAINTAINED FOR A STIPULATED PERIOD

Section 7 of the Natural Gas Act requires a certificate of public convenience and necessity before a gas producer or a pipeline may perform services embraced by the Commission's regulatory authority. It also empowers the Commission to include in its certificate such reasonable terms and conditions as the public interest may require.

Section 4 requires a natural gas company to file any proposed changes in rates or service with the Commission, giving 30 days' advance notice. The

new rates are then subject to suspension for a maximum period of five months, pending investigation of their justness and reasonableness. At this point they may be put into effect if the administrative proceeding has not been concluded and an order entered by the Commission. When increased rates are thus made effective, the Commission, for its part, may require a bond or undertaking in order to assure refund of that portion of the rate ultimately found excessive."[10]

Stated broadly and in terms of the statute, the question in this case is whether the provision requiring natural gas companies to file proposed changes in rates and empowering the Commission to suspend and examine those rates (Section 4) implies that the Commission, in tendering a certificate pursuant to its powers under Section 7, is estopped from imposing a condition which will require the company to maintain its initial rates, as approved by the Commission, for a prescribed period without filing for an increase. More narrowly, the question is whether, at the least, such a condition may be imposed in issuing a temporary authorization, pending a hearing on the company's application for permanent authority.

Finding no significant distinction between temporary and permanent certificates for the purpose

[10] Section 5, broadly speaking, authorizes the Commission to institute a rate investigation of its own motion or upon complaint and to prescribe just and reasonable rates for the future. Since such an investigation does not originate with a suspension of rates, the Commission's ultimate order in a Section 5 proceeding entails no obligation to refund for past periods.

at hand, the court of appeals has held that in neither event may the Commission condition its grant of authority so as to preclude the filing of proposed rate increases which are contractually authorized. This, we believe, improperly subordinates the Commission's vital responsibilities under Section 7—responsibilities which have been delineated in this Court's prior opinions—to the producer's rights as declared by his private contract. In our view, the holding lacks sound basis in the statutory scheme and impairs the Commission's ability to pursue the principal statutory objective: to provide adequate protection to the ultimate consumer.

A. THE PUBLIC CONVENIENCE AND NECESSITY MAY NOT PERMIT THE COLLECTION OF PRICES AUTHORIZED BY A GAS SALES CONTRACT, EVEN ASSUMING THAT THEY ARE JUST AND REASONABLE BY REFERENCE TO THE COSTS OF THE PARTICULAR PRODUCER

This Court made it unmistakably clear in the *CATCO* case [11] that Sections 7 (c) and (e) of the Natural Gas Act, *infra*, pp. 43–45, impose upon the Commission the duty to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale of natural gas in interstate commerce. The Commission can do this by denying a certificate for a sale which, for any reason (including price), is not required by the public convenience and necessity. Alternatively, it may authorize the sale subject to conditions. In following the latter course, the only limitation stated in the statute is that

[11] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

the Commission shall confine itself to "such reasonable terms and conditions as the public convenience and necessity may require." Even if a producer is so circumstanced that a high contract rate would be a "just and reasonable rate" (the language of Section 4) in terms of that particular company's costs, the Act contemplates that certification may be denied where "the public convenience and necessity" standard of Section 7 does not "require" that gas be supplied at such a price. It is obviously appropriate, in such a case, for the Commission to offer to certificate the sale at a price which *does* meet the public convenience and necessity. If the producer does not find the terms and conditions of this offer acceptable, he is not compelled to initiate the proposed service."[12] As this Court observed in *CATCO* (360 U.S. at 387), there is no irrevocable dedication of the gas until it commences to flow in interstate commerce.

While the standard of public convenience and necessity is not susceptible of precise definition, a central consideration is the proposed rate. *CATCO, supra.*[13] In the Court's words, the Commission is re-

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[12] The fact that a natural gas company may, at the outset, refuse to render service except on its own terms does not, of course, require the Commission to approve service on those terms. As the Tenth Circuit stated in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 267 F. 2d 471, 472, affirmed, 364 U.S. 137, a contrary conclusion would mean that a natural gas company could dictate the terms and conditions of every certificate.

[13] See also, the following cases, decided subsequent to *CATCO*, which relate to the Commission's obligation to establish an initial "in-line" price: *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari

quired to give "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." *Id.*, 360 U.S. at 391. When an application "signals the existence of a situation that probably would not be in the public interest" a certificate should either not be issued or such conditions should be imposed as the Commission reasonably believes necessary to protect the public interest. *Ibid.* The Court also observed that a proposed price would not be in keeping with the public interest if that price were "out of line" or "might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise * * *." *Ibid.*

It is true, to be sure, that the specific condition discussed by the Court in *CATCO* would have permitted the collection of the contract price, subject to refund, after a suspension of only one day.[14] Con-

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denied, *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 882; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[14] This was the form of condition which the Commission had originally sought to impose but which it had abandoned in the order under review.

trary to the suggestion below, however (R. 332), there is nothing in the *CATCO* decision narrowly limiting the Commission to the imposition of this particular type of condition or suggesting that it should be adopted in circumstances where it would prove ineffective." The essential point is that the Commission's conditioning power should be used to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," since the "overriding intent of the Congress [is] to give full protective coverage to the consumer as to price * * *." 360 U.S. at 388–389.

The Commission's experience since 1959, when *CATCO* was decided by this Court, has demonstrated that the particular type of condition originally offered to the *CATCO* producers may, in some circumstances, be quite inadequate for the purpose in view. Thus, it is apparent that the triggering of price rises, to which this Court pointedly referred, may result from the very collection of out-of-line prices by a producer, even though all amounts later determined to be excessive are subject to refund. See *Pure Oil Co.*, 25 FPC 383, 389–390, affirmed, 299 F. 2d 370 (C.A. 7); *Gulf Oil Corp.*, 23 FPC 664, 666–667.[15] As the Commission

[15] In *CATCO* that condition was not challenged by the consumer groups when it was originally imposed.

[16] In the latter case, the Commission said 23 FPC at 666–667: "The examiner's decision provided that the producers would be allowed to collect the original contract rate subject to refund one day after service commenced at the conditioned initial rate. Such a provision would deprive the initial price condition of much of its effect. If the line established by the initial price is abandoned within a day, the market probably

explained in this case (R. 146-148), these effects are often irreversible; even though the particular triggering price may ultimately be restored to the prior level and intervening collections above that level refunded, the higher level may continue to prevail, indefinitely or for protracted periods, under other producers' contracts which have been triggered.

In this connection, we note that intrastate sales contracts tend to follow the terms of interstate sales (see, *e.g., Cities Service Gas Company*, 14 FPC 134, 145-148, affirmed *sub nom. Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923), but with no assurance that high rates under intrastate contracts will be suspended, refunded, or even conformed to later readjustments in interstate rate levels. Thus, rates collected by producers for sales under the Commission's

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will establish a new high price at the effective contract price of twenty cents. Our experience has shown that although this new high price is conditional and is being collected subject to refund, that it tends to set a new price plateau. Other new contracts in the area almost inevitably are entered into at this price. The prices in old contracts containing favored nation clauses and price redetermination clauses based on the highest prices being paid in the area escalate to this new price. Thus, although all of these prices may be suspended or otherwise made subject to refund by the Commission, the inevitable result of permitting a new high rate to become effective is that the new price tends to become the prevailing price. Furthermore, since such a price will be subject to refund, it will only increase the uncertainty of prices in the gas industry. In our judgment, the purposes for which initial rate conditions were intended can best be achieved by holding the line at a rate which is comparable to that allowed other producers in similar circumstances but which is not subject to immediate change."

jurisdiction, even though subject to refund, tend to set a level of non-jurisdictional intrastate rates; these in turn may generate reciprocal pressures on the jurisdictional rates. Certainly, *CATCO* suggests that the Commission should exercise its Section 7 authority to avoid the likelihood of such a chain reaction. *Cf., Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24–27; *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 240 (C.A. 2), certiorari denied, 320 U.S. 751.

Moreover, even if all of the triggered rates, interstate and intrastate, were subject to refund, there would remain the serious detriment attendant upon the collection of excessive charges. As this Court recognized only last term in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154, the possibility of refund does not afford full protection to the consumer:

> "* * * True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory * * *. It is, therefore, the duty of the Commission to look at "the backdrop of the practical consequences [resulting] * * * and the purpose of the Act," *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U.S. 137, 147 (1960), in exercising its discretion under § 16 to issue interim orders * * *.

The Commission's duty under Section 7 requires it, of course, to consider all of the terms and conditions affecting the proposed sale—not merely the initial price. See *Superior Oil Co.* v. *Federal Power*

Commission, 332 F. 2d 601, 617 (C.A. 9). This, also, may disclose the need for a continuing ceiling on the filing of increased rates. To illustrate, let us assume that in a given producing area the Commission has been unconditionally certificating sales pursuant to contracts uniformly calling for an initial price of 18 cents, with no provision for any type of price escalation for five years. At the same time, we will suppose, it has denied certificates where the proposed initial price was 19 cents—on the grounds that 19 cents was out of line; that collection of the 19-cent rate, even subject to refund, would trigger price increases; and that there was no showing of need for gas on more expensive terms. It would seem apparent that a sales contract calling for an 18-cent price for the first thirty days of delivery, with an escalation to 19 cents thereafter, would be objectionable for substantially the same reasons.

Indeed, in the circumstances posed, a contract calling for increases within one or two years (or, perhaps, any period less than the five-year escalation period uniformly called for in the other producer contracts) might well be denied certification on the obvious ground that the sale was unnecessary from the standpoint of providing the public an adequate and economical supply of gas. If the Commission, as seems beyond question, could deny the application outright in such a case, it would seem strange to conclude that it may not take a lesser step—namely, offer certification conditioned upon the elimination of these fea-

tures of the contract which stand in the way of a finding of public conveniences and necessity."

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[17] For a recent example of a matter involving limitations upon future filings imposed in connection with the issuance of a permanent certificate, see *Placid Oil Co.*, Docket Nos. G-13183, *et al.*, 49 P.U.R. 3d 332, pending on review *sub nom. Callery Properties, Inc., et al.*, C.A. 5, Nos. 20872, *et al.* In those cases, some of which involved the same sales involved in this Court's remand in *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195, the initial prices were in general 23.55 cents, with a 2-cent escalation in July 1962. The Commission found that the in-line price was 20 cents for on-shore properties. However, it also found that collection of prices above 23.55 cents, the amount that was being collected during the pendency of the proceedings, would contractually trigger South Louisiana price increases. Accordingly, the Commission conditioned the permanent certificates which it issued there not only upon reduction of the initial price to 20 cents but also upon not filing any increased rate of more than 23.55 cents, pending the final decision in the area rate proceeding, Docket No. AR61-2, or July 1, 1967, whichever is earlier.

See, also, *Trunkline Gas Co.*, 21 FPC 704, petition for review dismissed, *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 284 F. 2d 200 (C.A.D.C.). There the Commission, in certificating a higher initial price than any previously approved, explained (21 FPC 719): "* * * these contracts provide for a firm 20 cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the usual provisions for escalations and redeterminations found in most contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20 cent price is required by the public convenience and necessity; and, it will not be sufficient for producers hereafter seeking certificates to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price. We shall

B. THE LEGISLATIVE HISTORY OF SECTION 7 CLEARLY SHOWS THAT THE COMMISSION MAY IMPOSE CERTIFICATE CONDITIONS INCONSISTENT WITH THE UNDERLYING CONTRACT WHERE NECESSARY TO PROTECT THE PUBLIC INTEREST

The present provisions of Section 7 (c) and (e) were added in 1942, four years after the passage of the Natural Gas Act. The addition of the broad certificate requirement contained in these sections was intended to strengthen and make more effective the Commission's regulation, which was then generally limited to the control of rates pursuant to Sections 4 and 5 of the Act.

As originally enacted, the Gas Act subjected any company rendering a jurisdictional service to Commission regulation of rates and charges. In addition, it was provided that, once service had been initiated, jurisdictional facilities or services could be abandoned only with Commission approval pursuant to Section 7(b). The power of the Commission to

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closely scrutinize any such proposed sales in this area under contracts which provide for price escalations or redeterminations above 20 cents per Mcf within a period of five years, and in the absence of a clear showing that such prices are required by the public convenience and necessity, we shall either deny the applications or impose price conditions."

In a subsequent proceeding, where the contracts called for an initial price of 20 cents and escalation of 2 cents every four years, the Commission issued the certificate upon the condition that the price structure should be modified to conform to that approved in the *Trunkline* case, *i.e.*, that there would be a firm 20-cent price for 10 years. *Peoples Gulf Coast Natural Gas Pipeline Co.*, 24 FPC 1, certificate vacated by order of November 2, 1961, *Hassie Hunt Trust, et al.*, 26 FPC 680. The vacating order is now pending on petitions for review in the Fifth Circuit, see *supra*, p. 4.

control initiation of service was then confined to situations in which a company sought to enter a market already being served by another natural gas company.[18] Since most of the expansion during the period the 1938 provisions remained in effect was directed to development of new markets, rather than service to markets already served, this meant that, in most instances, the Commission had no control over the initiation of service by natural gas companies, over investment in the facilities required to render those services, or over the initial rate structures.[19]

In 1942, Congress undertook to close this gap in the regulatory scheme. Section 7(c) was changed so as to require certificates of public convenience and necessity for all jurisdictional services and for the construction, extension or acquisition of facilities, the use of which would be subject to Commission regulation. Congress also added Section 7(e), which prescribes the standards to be applied by the Commission

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[18] In determining whether a certificate of public convenience and necessity should be granted to enter a competitive market, the Commission was required to "* * * give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce * * * at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." [52 Stat. 825]

[19] Prior to the amendment of the Act in 1942, only 16 certificate applications were received by the Commission. The majority were dismissed for lack of jurisdiction and only four certificates were issued. See Federal Power Commission, *The First Five Years Under the Natural Gas Act* (1944), p. 3.

in deciding whether a proposed act or service should be authorized and specifically provides that:

> * * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

The purpose of these amendments was explained by the House Committee on Interstate and Foreign Commerce in these terms (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2–3):

> * * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension *at a time when such vital matters can readily be modified as the public interest may demand.* * * * [Emphasis supplied.]

The Senate Committee on Interstate Commerce made a similar explanation (S. Rep. No. 948, 77th Cong., 2d Sess., pp. 1–2):

> Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The

present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. *The characteristics of their rate structure could be studied.* * * * [Emphasis supplied.]

See, also, Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 5–6.

In short, Congress expected the Commission to consider and, if necessary, modify a gas company's rates or matters affecting them in the process of deciding whether and on what terms a certificate should be issued. The Commission has long recognized this obligation and, in addition to imposing conditions with respect to initial prices, has frequently found it necessary to require modification of other tariff or contract provisions as a condition to granting certificates of public convenience and necessity. *E.g., Florida Economic Advisory Council* v. *Federal Power Commission,* 251 F. 2d 643, 646, 648 (C.A. D.C.), certiorari denied, 356 U.S. 959, affirming *Houston Texas Gas and Oil Corp.,* 16 FPC 118, and 17 FPC 303 (condition requiring elimination of cancellation provisions in transportation agreement); *Northern Natural Gas Co.,* 22 FPC 164, 174–175, 180, affirmed *sub nom. Minneapolis Gas Company* v. *Federal Power Commission,* 278 F. 2d 870 (C.A.D.C.) certiorari denied, 364 U.S. 891 (certificate conditioned upon removal of clauses permitting cancellation depending on price relationship of gas and competitive fuels in gas purchase contracts upon which feasibility

of pipeline project depended); *Transwestern Pipeline Co.*, 22 FPC 391, 394–395, modified on rehearing, 22 FPC 542 (minimum bill provisions of proposed tariff required to be modified); *Panhandle Eastern Pipe Line Co.*, 10 FPC 185[20] (conditions requiring inclusion of interruptible rate schedules in tariffs). *Trans-Continental Gas Pipe Line Co.*, 7 FPC 24, 38–40 (commencement of service conditioned upon filing of new tariff satisfactory to Commission because of disapproval of certain terms of service); *Alabama-Tennessee Natural Gas Co.*, 7 FPC 257[21] (commencement of service conditioned upon filing of tariff satisfactory to Commission). The alternative to imposition of appropriate conditions, *i.e.*, outright denial of a certificate, has also been employed by the Commission to prevent an inferior "end use" of gas and possible future inflation of field prices by sales not in themselves subject to the Commission's regulation. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23–25.[22]

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[20] See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 282 F. 2d 467 (C.A. 3), certiorari denied, 352 U.S. 891, where a collateral attack on this condition was rejected by the Court.

[21] Discussed and implemented in *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494 (C.A. 3).

[22] Even prior to the 1942 amendments to Section 7 (which for the first time in express and specific terms gave the Commission conditioning power) the Commission imposed a condition which provided that the "certificate shall be cancellable if applicant increases or proposes to increase the rate to the consumers proposed to be served above ten (10) cents per M.c.f." *Louisiana-Nevada Transit Co.*, 2 FPC 546, 549, affirmed *sub nom. Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (C.A. 5).

C. THIS COURT'S DECISION IN "*MOBILE*" DOES NOT SUPPORT THE RESULT REACHED BELOW

If, as the court below held, the Commission's power to condition certificates must yield to an uncontrollable "right" in a producer to file rate changes under Section 4 and to put those changes into effect, the agency's ability to realize the objectives delineated in *CATCO* is substantially impaired. Indeed, if the teaching of *CATCO* is to prove meaningful, Section 4(d) must continue to be treated as it was in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332—not as an affirmative grant of power to natural gas companies, but as a restrictive regulatory provision imposing notice and filing obligations on such companies as a condition of putting into effect their *otherwise authorized* rate changes. As the Third Circuit stated[23] in dealing with a pipeline's effort to escape a rate condition imposed in its certificate by filing a change pursuant to Section 4(d):

> * * * What Section 4(d) provides is an alternative method of effecting changes otherwise permissible by virtue of the Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation* (*Federal Power Commission* v. *Mobile Gas Service Corp.*), 1956, 350 U.S. 332 * * * [24].

The reliance of the court below on *Mobile* as supporting its view that the Commission's Section 7 pow-

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[23] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467, 473 (C.A. 3), certiorari denied, 352 U.S. 891.

[24] This opinion was written by Judge McLaughlin who had also authored the opinion affirmed by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

ers are subordinate to the contracting powers of the companies is wholly misplaced. In *Mobile*, although the pipeline had agreed to sell gas for resale to an industrial user at a fixed price for a period of ten years, it filed an increased rate pursuant to Section 4(d) without any consent from its customer. This Court, pointing out that passage of the Natural Gas Act had not abrogated contracts but, instead, had superimposed a regulatory scheme, concluded that Section 4 did not create a right to file increased rates inconsistent with contractual obligations (350 U.S. at 339):

> * * * § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4(c) purports to define what constitutes a "contract" that may be filed with the Commission. The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. * * * [Emphasis in original.]

The Court added that "contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest" (350 U.S. at 344). See, also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353. In short, the holding in *Mobile* that the provisions of Section 4 of the Act did not nullify contractual limitations on price increases cannot be converted into a determination that the Commission's broad certificat-

ing authority under Section 7 is circumscribed by contractual provisions authorizing rate increases."[14]

That *Mobile* was concerned with a utility's unilateral efforts to take measures opposed to its customer's interests and that it nowise derogates from the scope of the Commission's powers is a proposition confirmed by the companion *Sierra* case, *supra*, decided the same day. There the Court, construing the similar provisions of the Federal Power Act,[15] declared that the Commission could relieve the seller of contractual obligations inhibiting a price rise if, but only if, it could be demonstrated that the public

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[14] Compare the analysis of *Mobile* by Judge Soper for the Fourth Circuit in *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F. 2d 755, 761–762, certiorari denied, 356 U.S. 912: "It was held [in *Mobile*] that this [rate change filing] procedure precludes a producer from changing contracts unilaterally to serve its own private interest, but affords an avenue of relief when the interest of the producer coincides with the public interest. In such case the utility [*i.e.*, the producer] has the right to complain and ask the Commission to investigate the rate, and if it finds after hearing that the contract rate is so low as to conflict with the public interest, it has authority to increase the rate."

After discussing *Sierra*, Judge Soper concluded: "The practical effect of the decision is to compel contracting utilities to abide by their agreements unless it is shown that the agreed rate is so low 'as to impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discrimnatory.' These quoted clauses form the cornerstone of the utilities argument, but it is plain that they are directed to rates too *low* to be ordnarily imposed." (Emphasis in original.)

[15] Sections 205 and 206(a), 16 U.S.C. 824d and 824e(a).

interest required such action, *i.e.*, if it were shown that the rate yielded a return "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory" (350 U.S. at 355). The Court went on to explain (*id.*):

> * * * That the purpose of the power given the Commission by § 206(a) [the Power Act equivalent to Section 5(a) of the Natural Gas Act] is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed "is necessary in the public interest." When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

The reliance (R. 332–333) by the court below on language in *Mobile* stating that the function of the Commission is to review rates but not to fix them in the first place is also misplaced. Even in proceedings pursuant to Section 4 or 5 of the Act—the type of proceedings to which the comment was directed—the Commission, as part of its function in reviewing rates, may fix substitute rates itself if the company-filed rates are not shown to be lawful. Indeed, Section 5 expressly states that the Commission "shall fix" just and reasonable rates in such circumstances. Similarly, in imposing conditions with respect to rates and contracts in a Section 7 certificate proceeding the

Commission is merely reviewing proposed rates initially fixed by the company, by contract or otherwise, in order to determine whether the contractual rate structure meets the statutory test for certification.

II

THE ISSUANCE OF TEMPORARY AUTHORIZATIONS UPON CONDITION THAT NO INCREASED RATE BE FILED PENDING FINAL CERTIFICATE ACTION IS REASONABLE IRRESPECTIVE OF THE SCOPE OF THE COMMISSION'S POWER TO CONDITION PERMANENT CERTIFICATES

The court below treated permanent certificates and temporary authorizations alike for the purpose of testing the validity of the condition here at issue. We believe that there are significant differences and that all of these differences make the Commission's case even stronger when the condition is one annexed to a temporary authorization.

Under Section 7(c), the Commission "may issue a temporary certificate in cases of emergency. * * *." This language of discretion imports considerable latitude as to whether such an authorization should be granted and, by the same token, great freedom to determine when or upon what conditions it will be issued. In contrast, Section 7(e), although it explicitly confers the power to attach appropriate conditions to a grant of permanent authority, provides that a certificate "shall be issued" in any case in which the applicant has made the requisite showing of public convenience and necessity.

There is another important consideration. A permanent certificate is issued only after the Com-

mission has determined, following notice to interested parties and a hearing, that the applicant is qualified to render the service; that he is prepared to conform to the requirements of the Act and the Commission's regulations; that there is a public need for the service; and that the price is not out of line. The mandatory requirement of a hearing[27] guards against improvident grants. Among other things, it furnishes assurance that the interests of consumer groups will be heard and considered before the Commission approves any sale at an initial price which they may deem objectionable. The summary character of a grant of temporary authority, which is characteristically made without a hearing, makes it all the more incumbent upon the Commission to adopt measures which will guard against any untoward consequences. As we have already shown in Point I, *supra*, pp. 19–23, the collection of an excessive rate may have such consequences quite apart from the inadequacy of imposing an obligation to make refunds. The damage may be done even before the hearing on the application for permanent authority is held.

The underlying purpose in according the Commission the power to grant temporary authorizations is itself suggestive. In adopting the broader certification provisions of Section 7 in 1942, Congress recognized that this hearing process, particularly where there is a serious challenge to grant of the applica-

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[27] Compare, *e.g.*, Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. (Supp. IV) 309, which does not make a hearing a necessary prerequisite to the grant of a license.

tion, will inevitably take time and that there will be emergency situations where a seller would suffer irreparable harm if he could not commence operation upon some basis while the proceeding to determine the exact terms of service was in process. Accordingly, it provided that the Commission, in its discretion, could issue temporary certificates without notice or hearing pending the determination of the application for permanent certificates. The need for such temporary authorizations in the producer field is particularly acute; gas which cannot be sold must often be flared, *i.e.*, permitted to escape from the well and burned off. In other instances, gas which is not sold will be drained off by adjacent wells from which sales are authorized. And many producers, as lessees, will be contractually obligated to pay so-called "shut-in royalties" to the landowner if they cannot sell their gas, thus increasing the operating costs usually passed on to the consumer. To deal with these various situations, the Commission, by Section 157.28 of its Regulations, *infra*, pp. 45–46, has prescribed the conditions which it will consider to be emergencies warranting the issuance of temporary authorizations."

"In the notice proposing its regulations relating to temporary authorizations for producers, the Commission explained the need for the regulations as follows (21 Fed. Reg. 4833, June 29, 1956): "The Commission's experience has indicated the advisability of making possible the earlier initiation of sales or transportation of natural gas in cases where even the normal regulatory lag in the processing of applications for temporary authorization may result in losses to the applicant arising, among other things, from drainage of property by

As already indicated, this means that temporary authority is normally granted without notice or hearing, upon a producer's *ex parte* showing that he is faced with serious hardship. There is accordingly no record basis at this stage for determining whether the proposed price is in line within the meaning of the *CATCO* decision. To provide protection during the pendency of the application for permanent authority, the Commission has adopted a uniform policy of fixing certain ceiling or guideline prices which it will not breach in authorizing new sales. These guidelines have been established for each production area as part of the agency's interim program to hold the price line pending establishment of just and reasonable area prices. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294. This price, of course, is a tentative one—it is subject to modification upon disposition of the application for permanent authority—but it represents the Commission's con-

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adjoining wells, possible loss of lease from non-production, economic hardship resulting from payment of shut-in royalties or lack of income or the excessive flaring of gas. The Commission is of the opinion that the public interest in sound regulatory processes neither requires nor justifies that these economic burdens be borne by the producing segment of the natural-gas industry."

The Commission has recently instituted new procedures under which uncontested producer applications can be processed through final grant within five to seven weeks of filing. See FPC Press Release No. 12783, dated June 17, 1963. In view of this development it has refrained from issuing temporary authorizations in cases appearing to present no issue warranting a formal contested hearing, unless the emergency condition prevailing is of a particularly acute nature, as is the case with flaring or imminent threat of loss of lease.

sidered and expert judgment as to a price which will reasonably safeguard the interests of the consumer while permitting the producer to avoid the harsh and wasteful consequences of delay.

We question whether, even in the absence of an express prohibition, the holder of such an emergency authorization would have the right to alter the initial price set forth in the instrument approving the interim operation. We stress that the applicant for a "temporary" has not submitted his credentials to the test of an adversary proceeding. He has merely invoked the Commission's discretion to permit him to go forward *pendente lite*." It stands to reason that he may not be permitted, during that period, to alter unilaterally the terms which the Commission took into account in exercising its discretion in his favor.

This, indeed, is the plain teaching of the Third Circuit's decision in *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494. There, the Commission, after a hearing, granted a certificate of public convenience and necessity to a new pipeline. Concluding, however, that it lacked adequate experience to enable it to fix immediately a proper initial rate for the company, the Commis-

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[20] In contrast, Section 7(e) provides that the Commission "shall" issue a permanent certificate to an applicant who, after the prescribed hearing, meets the statutory tests set forth in the Section. Since such a person holds his certificate as of right it would follow that, in the absence of an express certificate condition to the contrary, he has the right to increase his price subject only to the inhibitions of Section 4.

sion conditioned the certificate upon the pipeline's subsequent filing of a satisfactory tariff. Meanwhile, operations were allowed to go forward at a specified "interim" rate. No express condition against any increase in this interim rate was inserted in the certificate. Prior to the Commission's approval of a satisfactory tariff, the company filed an increase in the interim rate in purported reliance on Section 4(d). Upholding the Commission's authority to reject this filing, the Third Circuit, speaking through Judge Hastie, ruled that Section 7 was controlling (268 F. 2d at 497):

> • • • To treat the "interim rate" permitted under the June 16, 1950 order [permitting operation at that rate] as the kind of rate which is subject to change on the free initiative of the Company under Section 4(d) is to ignore the restrictive context in which it was allowed to become effective. For it is our premise that the Commission had power to impose the rate condition • • •. Only after such an initial determination of a satisfactory rate in compliance with the June 16, 1950 order, could the Company properly claim that it was operating under the kind of tariff that is subject to change by Section 4(d) procedure.

Here, the case is even clearer. The temporary authorization carried an express prohibition forbidding a change in the rate.

Finally, we submit that where a producer has been expressly put on notice, it cannot avail itself of the benefits of the authorization and commence service which the Commission might never have authorized

unconditionally, while reserving to itself "a right" to ignore a controlling condition. To paraphrase this Court's holding in *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513, "having invoked the power of the Commission [to confer the benefit], it is now estopped to deny the Commission's power to issue the certificate in its present form * * *."*

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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* The court below finds similarity between permanent and temporary authorization because the producer in either instance dedicates his gas to interstate commerce once he commences service. But the producer is under no obligation to begin service under a temporary authorization which he finds unacceptable or wishes to challenge. Nor can he, by commencing service, frustrate the exercise of the Commission's responsibility under Section 7 to make a full investigation of proposed rates which may adversely affect the price structure.

APPENDIX

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the clas-

sifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time

when it would otherwise go into effect;[1] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

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SEC. 7 * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without

[1] Subsection 4(e) was amended May 21, 1962, by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance

[1] Subsection 7(c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)].[3]

* * * * *

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the

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[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938)).

[4] See footnote 2.

whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

2. The Commission's Regulations Under the Natural Gas Act, 18 C.F.R., Subchapter E, as amended, provide in pertinent part:

Sec. 157.28. Temporary authorizations.

Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however,* That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown. [Cum. Supp. 1963.]

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportion is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.

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(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown. [Cum. Supp. 1963.]

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.